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BRIEFS

FILED
JAN 10 2014
OFFICE OF THE CLERK

No. 13-356

In the
Supreme Court of the United States

CONESTOGA WOOD SPECIALTIES CORP., et al.,
Petitioners,

v.

KATHLEEN SEBELIUS, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether the religious owners of a family business, or their closely-held business corporation, have free exercise rights that are violated by the application of the contraceptive-coverage Mandate of the Patient Protection and Affordable Care Act of 2010 ("ACA").

PARTIES TO THE PROCEEDING

Petitioners are Conestoga Wood Specialties Corporation and its family owners, Norman and Elizabeth Hahn, and their three sons, Norman Lemar, Anthony, and Kevin Hahn.

Respondents are the Departments of Health and Human Services, Treasury, and Labor, and the Secretaries thereof, Kathleen Sebelius, Jacob Lew, and Thomas E. Perez, respectively, sued in their official capacities. During the litigation below, the Secretaries of the Treasury and Labor Departments were replaced by Mr. Lew and Mr. Perez, respectively.

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OPINIONS BELOW

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JURISDICTION

The Court of Appeals entered its judgment on July 26, 2013, and denied rehearing en banc on August 14, 2013. The petition was filed on September 19, 2013, and granted on November 26, 2013. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. CONST. amend. I is set out in pertinent part at Pet. 3. The Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb *et seq.*, is set out in pertinent part at Pet. 3–4. The Dictionary Act, 1 U.S.C. § 1, is set out in pertinent part at Pet. 4. The Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 300gg-13(a), is set out in pertinent part at Pet. 4. Other relevant statutory provisions are excerpted at Pet. App. 1e–18e. Pertinent regulatory provisions are excerpted at Pet. App. 1f–19f.

INTRODUCTION

Respondent agencies enacted a rule requiring private citizens to buy contraceptive insurance

coverage for other citizens. The rule (hereinafter the "Mandate") includes items that can end an early human life before its implantation in the uterus, and applies regardless of a health plan sponsor's religious beliefs in favor of human life.

Congress did not require this coercive action. It did not include contraceptives or abortifacients in the "preventive services" listed in the ACA, and it deemphasized the preventive services requirement in general. Congress exempted thousands of employers from the Mandate's scope for secular reasons, and it granted Respondents comprehensive authority to grant religious exemptions like the one requested here.

Thus Congress appreciated the detrimental effects that provisions like the Mandate may have on employers' free exercise of religion. It has long been solicitous of private citizens' rights under the Free Exercise Clause, so much so that it enacted the Religious Freedom Restoration Act of 1993 ("RFRA") to ensure that government burdens on those rights are subject to exacting judicial review. Importantly, Congress chose not to exempt the ACA from RFRA's scope.

To overcome Congress' policy of toleration for religious views on human life, Respondents advance the unprecedented theory that families cannot exercise religion when they earn a living through a business. Because citizens exercise religion in every area of their lives, this Court has recognized that individuals may exercise religion in business and that citizens may join together to exercise religion

through corporations.

Respondents' argument is inconsistent with the reality of religious activity in Americans' daily lives. There is no separating the Hahns' faith from their business or its actions. The members of the Hahn family, as Mennonite Christians, practice their faith in everything they do, including the running of their business. They, and their business corporation at their direction, have long excluded abortifacient contraceptives from Conestoga's healthcare plan, in keeping with their religious beliefs.

The Mandate substantially burdens Petitioners' exercise of religion. It forces them to choose between violating their religious convictions and incurring ruinous fines and lawsuits. No compelling interest justifies imposing such a Hobson's choice, particularly given the government's exclusion of thousands of other employers from the Mandate's scope. Many less restrictive alternatives exist, including expanding government funding of birth control. Accordingly, RFRA and the Free Exercise Clause require exempting Petitioners from the Mandate's heavy religious toll.

STATEMENT OF THE CASE

I. Factual Background

Petitioners Norman and Elizabeth Hahn and their three sons, Norman Lemar, Anthony, and Kevin Hahn, are devout Mennonite Christians who integrate their faith into their daily lives, including their work. Pet. App. 9g–10g. The Mennonite Church teaches that taking a life is an intrinsic evil and sin

against God for which all are held accountable. Pet. App. 10g. Accordingly, the Hahns believe that it would be immoral for them to facilitate, or otherwise support the taking of a human life through war, capital punishment, suicide, euthanasia, or abortion. Pet. App. 23g.

The Hahns consider it an abortion to prevent the implantation of a human embryo into its mother's uterus after its fertilization (an effect hereinafter referred to as "abortifacient"). As Respondents have conceded, a number of FDA-approved contraceptives have the potential to prevent the uterine implantation of human embryos. *See* Br. in Opp. at 10 n.5; *accord* FDA, *Birth Control: Medicines To Help You*, *available at* http://www.fda.gov/forconsumers/byaudience/forwomen/freepublications/ucm313215.htm (last visited Jan. 9, 2014) [excerpted in Pet. App. at 1i–5i] (stating that various items, including Plan B, Ella, and certain intrauterine devices (IUDs) may "prevent[]" "implant[ation]" of embryos). The Hahns accordingly object to facilitating their use. Pet. App. 3g, 10g–11g, 22g–23g.

The Hahn family solely owns and controls Petitioner Conestoga Wood Specialties ("Conestoga"), a business corporation that Norman Hahn started in a small garage in Lancaster County, Pennsylvania, in 1964. Pet. App. 6g–7g; Conestoga, *About Us*, http://www.conestogawood.com/about (last visited Jan. 9, 2014). Conestoga makes doors and other wooden parts for kitchen cabinets. Pet. App. 6g. It is incorporated under the laws of Pennsylvania and is organized under subchapter S of the Internal Revenue Code. Pet. App. 6g, 3h–5h. As a result,

Conestoga's income is not taxed at the corporate level but passes through to its owners. 26 U.S.C. § 1363.

The Hahns exercise sole ownership and ultimate management responsibility for the company, holding all of its voting shares and controlling its board of directors. Pet. App. 7g, 2h–4h. Anthony Hahn serves as Conestoga's President and Chief Executive Officer. Pet. App. 7g. The Hahns' Mennonite Christian faith requires them to integrate the gifts of the spiritual life, including its moral and social principles, into their life and work; they cannot separate their religious beliefs from their business practices. Pet. App. 10g–11g; App. 94–100.

As part of fulfilling their religious duties, Petitioners have provided generous health benefits to their approximately 950 employees, including preventive care coverage that went beyond what was required by law. Pet. App. 11g, 21g. But their healthcare plan excluded contraception that may act as an abortifacient. Pet. App. 3g, 10g–11g. Conestoga's Board of Directors also adopted "The Hahn Family Statement on the Sanctity of Human Life," which proclaims the family's "belie[f] that human life begins at conception" and its "moral conviction [against] be[ing] involved in the termination of human life through abortion ... or any other acts that involve the taking of human life." App. 100.

II. Statutory Background

In 2010, Congress passed the ACA. PUB. L. NO.

111-148, 124 Stat. 119 (2010). The ACA requires nearly all health insurance plans to abide by multiple rules benefitting patients, such as the requirement that plans cover dependents until age 26. 42 U.S.C. § 18011(3)–(4). But the Mandate challenged in this case is not one of those universal requirements.

The ACA requires that some health insurance plans cover preventive care and screenings, including women's preventive services. *Id.* § 300gg-13(a)(4). To define this category, the Department of Health and Human Services adopted guidelines formulated by the private Institute of Medicine into its preventive-care requirement. *See* Pet. App. 10a–11a. The IOM guidelines propose that all FDA-approved contraceptives, sterilization procedures, and related counseling be included in healthcare plans. Inst. of Med., *Clinical Preventive Services for Women: Closing the Gaps* 109–10 (2011), *available at* http://www.nap.edu/catalog.php?record_id=13181 (last visited Jan. 9, 2014) [excerpted in App. 44–69]. Collectively, the ACA and administrative adoption of these guidelines form the Mandate. Pet. App. 11a, 35a–36a; *see also* 45 C.F.R. § 147.130 (2013); 77 Fed. Reg. 8,725, 8,725 (Feb. 15, 2012).

Congress did not require that contraception or abortifacients be included in the Mandate. 42 U.S.C. § 300gg-13(a)(4). Congress also decided that the preventive services requirement in general need not be applied across the board. The ACA withholds the Mandate from grandfathered plans (those that have made minimal changes since 2010). *Id.* § 18011; 76 Fed. Reg. 46,621, 46,623 & n.4 (Aug. 3, 2011). The

government's data projects that these plans, even as they reduce in number, will cover tens of millions of women. 75 Fed. Reg. 34,538, 34,540–53 & tbl. 3 (June 17, 2010). It also projects that more than half of large employers—the category in which Conestoga, Hobby Lobby and Mardel fall—will maintain healthcare plans that are grandfathered. *Id.* The ACA declares that these employers have a "right to maintain existing coverage" falling short of the Mandate, 42 U.S.C. § 18011, even if they make certain changes that raise employees' costs, *see generally* 75 Fed. Reg. 34,538. Conestoga's plan lost grandfathered status in January 2011, before the Mandate existed. Pet. App. 21g.

Additionally, Congress empowered Respondents to enact "comprehensive" religious exemptions to the Mandate. 76 Fed. Reg. at 46,623. Using that authority, Respondents exempted churches and their integrated auxiliaries and provided an "accommodation" for other non-profit groups. 45 C.F.R. § 147.131 (2013); *see generally* 78 Fed. Reg. 39,870 (July 2, 2013). They also refrained from imposing penalties on the insurance administrators of certain non-church entities exempt from ERISA, even if the Mandate's benefits are not delivered. *See* Resp't Memo. in Opp. at 3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, S. Ct. No. 13A691 (filed Jan. 3, 2014) (stating that church plans are "exempt from regulation" under ERISA).

The ACA also does not require companies with less than fifty employees to offer insurance coverage. 26 U.S.C. § 4980H. And the Mandate does not reach members of certain Anabaptist congregations or

participants in health sharing ministries. *Id.* § 5000A(d)(2)(A) & (B). But Respondents declined to exempt religious objectors in business from the Mandate, such as Petitioners. 78 Fed. Reg. at 39,874–75.

Employers that violate the Mandate face government lawsuits under ERISA and fines of up to $100 per plan participant per day. 29 U.S.C. § 1132; 26 U.S.C. § 4980D. For Conestoga, that fine could "amount to $95,000 per day," which would "rapidly destroy the business and the 950 jobs that go with it." Pet. App. 36a. If Conestoga attempted to avoid these fines by dropping its healthcare plan altogether, it would incur a government penalty under 26 U.S.C. § 4980H "of $2,000 per full-time employee per year (totaling $1.9 million)," Pet. App. 36a n.4, as well as depriving its employees of their generous insurance plan so they are left to obtain insurance elsewhere, and costing Conestoga the additional wages needed to compensate employees for eliminating that employment benefit.

III. Proceedings Below

Petitioners filed suit in the U.S. District Court for the Eastern District of Pennsylvania, challenging the Mandate under the First Amendment's Free Exercise Clause and RFRA and seeking declaratory and injunctive relief. Pet. App. 23g–27g.[1] They

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[1] The complaint also alleges violations of the Establishment Clause, the Free Speech Clause, the Fifth Amendment's Due Process Clause, and the Administrative Procedure Act. Pet. App. 27g–33g. Petitioners relied only on RFRA and the Free Exercise Clause in their preliminary injunction motion.

moved for a temporary restraining order and preliminary injunction before their health plan was set to renew on January 1, 2013.

The district court first granted a temporary restraining order but later denied a preliminary injunction. Pet. App. 45b. It held that Conestoga, as a for-profit corporation, could not exercise religion under the First Amendment or RFRA and that the contraceptive-coverage Mandate did not substantially burden the Hahn family's religious exercise. Pet. App. 18b–22b, 32b–38b. Lacking injunctive relief, Conestoga's health issuer inserted coverage of the contraceptives into its plan over Petitioners' objection because the issuer sought to avoid penalties on itself.

Petitioners' only other option to avoid the Mandate at that point would have been to drop all health insurance coverage immediately for their 950 employees and their families. This would have not only deprived Petitioners' of the ability to offer healthcare coverage, but also violated Petitioners' religious principles by depriving their employees of the existing coverage. Pet. App. 11g. It would have been unjust to the employees and would have imposed costs on Conestoga to compensate employees for taking away their health insurance. Pet. App. 14g–15g, 21g–22g.

Petitioners timely appealed and moved for an injunction pending appeal. A divided panel of the court of appeals denied the injunction pending appeal. *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of Health & Human Servs.*, No. 13-1144,

2013 WL 1277419, at *3 (3d Cir. Feb. 8, 2013). A second divided panel of the Third Circuit affirmed the district court's denial of the preliminary injunction. Pet. App. 29a. As a "threshold" matter, this panel held that "for-profit, secular corporations cannot engage in religious exercise" under the First Amendment or RFRA. Pet. App. 10a. It also "declined to adopt the *Townley/Stormans* theory," under which the Ninth Circuit allowed corporations to claim the free exercise rights of their family owners, which pass through the corporate form when the family implements its religious beliefs in an incorporated business. Pet. App. 25a (discussing *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F.2d 610, 619–20 (9th Cir. 1988), and *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119–20 (9th Cir. 2009)).

The panel further rejected the Hahns' own claims because the contraceptive-coverage Mandate imposes its commands and penalties on Conestoga, "a legally distinct entity," not directly on the Hahns. Pet. App. 28a–30a. The panel expressly declined to reach the equitable factors governing preliminary injunctions, relying exclusively on the merits holdings discussed above. It thus established a *per se* rule that free exercise protections are unavailable to for-profit businesses and their owners. Pet. App. 29a.

Judge Jordan dissented. He noted that the majority's suggestion that only natural persons, not corporations, can exercise religion conflicts with this Court's precedents. Pet. App. 50a–54a. "[N]umerous Supreme Court decisions have recognized the right of corporations to enjoy the free exercise of religion." Pet. App. 50a–51a. Religious believers routinely

associate and organize to exercise religious rights collectively. Pet. App. 55a. And RFRA, by incorporating the Dictionary Act, directly extends its protections to corporations. Pet. App. 71a n.23.

Judge Jordan likewise explained that the exercise of religion is not confined to non-profit corporations and individuals. Pet. App. 61a–65a. Precedents of this Court and others have allowed entrepreneurs to challenge laws, such as Sunday-closing laws, on free exercise grounds. Pet. App. 65a (citing *Braunfeld v. Brown,* 366 U.S. 599, 601 (1961) (plurality opinion)). And other areas of First Amendment law, including the Free Speech Clause, recognize that "First Amendment protection extends to corporations," "*both for-profit and nonprofit*," Pet. App. 63a (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 342, 354 (2010) (emphasis in original)). Judge Jordan thus found that both Conestoga and the Hahn family could raise free exercise claims and that the Mandate imposes a substantial burden on them by forcing a choice between compliance and heavy penalties. Pet. App. 75a–79a.

He further concluded that the Mandate failed strict scrutiny and was not generally applicable because the government already exempts many health insurance plans from the Mandate, undermining its argument against accommodating Petitioners. Pet. App. 82a–84a. And the government failed to prove that the Mandate was the least restrictive means of promoting access to contraception. Pet. App. 84a–87a.

By a vote of 7 to 5, the Third Circuit denied en

banc review. Pet. App. 2c.

SUMMARY OF ARGUMENT

1a. The Hahns are a Mennonite Christian family whose faith permeates their entire lives, including the operation of their business. The Hahns directly own 100% of Conestoga's voting shares, they control its board of directors, and they guide its management decisions. Conestoga acts only as a result of the activity and direction of the Hahns.

When the government uses substantial pressure to coerce a family business to act contrary to its owners' religious beliefs, it burdens the free exercise of religion regardless of the business' corporate form. Until recent cases challenging the Mandate, no court had made a contrary suggestion.

Families may exercise religion through a closely-held business. Under this Court's caselaw, the corporate formality of a business is not determinative of whether religious exercise occurs in that business. People of faith approach business as an activity in which they practice their faith. This Court's precedent does not categorize the pursuit of financial gain as something incompatible with exercising religion. And religious observers have long used the corporate form to associate and practice their faith.

1b. Even if the religious activity of the Hahns and their business could be separated, Conestoga exercises religion too. State law authorizes Conestoga and corporations in general to pursue all lawful purposes, without excluding religion. Religion

is simply one of many activities that companies may pursue using the same mechanisms of action they use to pursue other lawful activities.

In enacting RFRA, Congress chose to rely on the Dictionary Act's definition of "person," which includes corporations and other artificial entities. 1 U.S.C. § 1. Moreover, Congress enacted RFRA against the backdrop of case law protecting corporations' free exercise claims. This Court has always safeguarded the free exercise rights of corporations, ranging from churches to schools to charities. It has never limited religious freedom to natural persons, as would be required if the free exercise of religion were a "purely personal" right. No coherent theory carves out for-profit corporations alone from the ability to exercise religion. The tax code's distinct treatment of income earned by for-profit and non-profit entities does not engender a valid First Amendment distinction.

2a. The Mandate substantially burdens Petitioners' religious exercise. It directly commands Petitioners to buy a healthcare policy that funds abortifacients in conflict with their religious beliefs regarding the destruction of human life. It also imposes ruinous fines and authorizes lawsuits if Petitioners fail to surrender and comply.

As such, the Mandate substantially burdens Conestoga's religious exercise by direct command and significant pressure. It also substantially burdens the Hahns' exercise of their religious faith. The Hahns, as Conestoga's family owners, are the only ones who can implement the Mandate for the

company. Any corporate losses due to lawsuits or financial penalties are directly passed onto them due to Conestoga's S corporation status.

The "substantiality" of a burden is a measure of government pressure. Courts may not postulate theological "attenuation" between the Hahns' religious beliefs and their corporate actions. The Mandate exerts substantial pressure on Petitioners and is thus subject to strict scrutiny under RFRA.

2b. Compelling interest review also applies under the Free Exercise Clause, as the holes in the Mandate's scope demonstrate that it is not generally applicable. Respondents' refusal to grant an exemption to Petitioners—as they have to others—also shows that the Mandate is not neutral.

3. For many reasons, the Mandate does not serve a compelling government interest. Congress, in the first instance, did not include contraception in the Mandate, and it authorized Respondents to implement comprehensive religious exemptions. The statutory language also places thousands of employers, and thus tens of millions of women, outside the Mandate's scope by allowing grandfathered healthcare plans not to offer contraceptives. Respondents have further exempted some religious employers from the Mandate wholesale.

Accordingly, the Mandate does not serve an interest of the "highest order." Indeed, the government's asserted goals of "equality" and "health" are far too broadly formulated to be

compelling. "Equality" interests have never required private citizens to purchase religiously objectionable products for others' use. Government may directly provide such items at will, but it cannot conscript private religious objectors into the government's service.

The government's asserted "health" interests in preventing unintended pregnancy have a weak evidentiary foundation. Not only does the Mandate fail to target the women most at risk of unintended pregnancy, but there is little evidence that the root cause is lack of access to free contraception. The government's evidence betrays uncertainty about a causal connection between unintended pregnancy and negative health consequences, and between a coverage mandate and a reduction of those effects. Such doubtful evidence is inadequate to abridge the free exercise of religion.

4. The Mandate is not the least restrictive means of pursuing the government's interests. The government already runs many programs that provide or pay for women's contraceptives. It could readily extend such programs or create other means to make up for any alleged gap caused by exemptions given to religious family business owners.

Because the Mandate neither serves compelling interests nor is narrowly tailored to advance such ends, the Mandate's application to Petitioners fails strict scrutiny.

ARGUMENT

I. Family Business Owners and Their Closely-Held Businesses Retain Free Exercise Rights, Whether or Not They Act Through the Corporate Form.

Religious people exercise religion through their closely-held businesses using the panoply of different business structures available under state law. Followers of kosher rules run catering companies. Families that observe the Sabbath operate fast food restaurants and craft stores. And those who value sacred texts publish and distribute books.

Whatever the legal status of their organizations, owners and operators do not check their beliefs at the door each Monday morning. They live their faith throughout the work week. Hence, it is the Hahns' religious beliefs that motivate Conestoga's charitable corporate actions, and it is the Hahns' religious beliefs that prevent Conestoga from providing drugs and devices that end a newly-formed human life. There is no separating the two.

Contrary to Respondents' suggestion, the free exercise of religion entails not only worship, but "the performance of (or abstention from) physical acts," including those required for Petitioners to comply with the Mandate against their sincerely held religious convictions. *Employment Div. Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990).

A. The Hahns Exercise Religion Through Their Business.

1. Government Burdens on a Closely-Held Corporation Implicate Its Family Business Owners' Free Exercise of Religion.

When a religious family runs a business, the family itself is impacted by what the business does, or what it is required to do. There is no separating the Hahns' faith from their business or its actions.

As Mennonite Christians, the Hahns follow a rich religious tradition that integrates their faith throughout their lives. They provide an excellent product to their customers, they care about the dignity of their employees, and they engage in daily business activities, all in furtherance of their religious beliefs. The Hahns' faith is reflected in their company's business model, values, and employee benefits—including in its healthcare plan that excluded abortifacients. App. 94–100; Pet. App. 3g, 9g–12g, 21g–23g.

The Hahns do not merely own Conestoga directly. They also control its board of directors and run its daily operations. Consequently, the Hahns are thoroughly engaged in implementing Conestoga's activities, including the coverage choices made for its healthcare plan. All of Conestoga's activities happen as a direct result of the Hahns' moral agency.

So when the government requires Conestoga to do something, that requirement impacts the Hahns' exercise of religion. The Mandate imposes a very real

and personal choice on the Hahns: (1) to honor their religious beliefs and thereby subject them and their employees to serious harm, (2) to comply with the Mandate and violate their own duty to God, or (3) to flee the business world altogether.

RFRA protects "any" exercise of religion. 42 U.S.C § 2000bb-2(4); *id.* § 2000cc-5(7)(A). This expansive definition inherently includes the Hahns' activities in their business. Nothing in RFRA or this Court's precedent suggests otherwise.

As this Court has repeatedly recognized, people may exercise religion through their closely-held businesses. For instance, Old Order Amish business owners may raise free-exercise challenges to "compulsory participation in the social security system." *United States v. Lee*, 455 U.S. 252, 256–57 (1982). As long as such claims are sincere, judges must accept that employers' participation "interferes with their free exercise rights." *Id.* at 257. And Orthodox Jewish merchants may raise free-exercise challenges to Sunday closing laws. *Braunfeld*, 366 U.S. at 606. Though *Lee* and *Braunfeld* ruled against these challengers on the merits, neither opinion suggested that the existence of religious exercise depends on a business' organizational form.

It makes little sense to argue that business owners exercised religion in those cases, but the Hahns may not do so because they operate through the corporate form. First Amendment protection depends not on "whether corporations 'have' First Amendment rights ... coextensive with those of natural persons," but instead on whether the action

is one "that the First Amendment was meant to protect." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978). When the Hahns religiously object to a government burden placed on Conestoga, their free exercise rights are implicated no less than those of the business owners in *Lee* and *Braunfeld*.

As the Tenth Circuit pointed out, "sincerely religious persons," like the Hahns, "find a connection between the exercise of religion and the pursuit of profit" regardless of whether the government thinks that they should. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1135 (10th Cir. 2013) (en banc). The government may not impose its opposite theological view that faith cannot mix with business. *See W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (holding the government cannot "prescribe what shall be orthodox in ... religion").

2. Lower Courts Widely Recognize That Closely-Held Business Owners' Free Exercise Rights Are Implicated by Commands Placed on Their Business.

Lower courts have explicitly recognized that family business owners' free exercise rights are implicated by a government mandate that forces the corporation to violate the family's beliefs. The Ninth Circuit recognized this principle some twenty-five years ago in *Townley*, 859 F.2d at 619–20. In that case, the EEOC sued a corporation that manufactured mining equipment and required employees to attend weekly religious services. *Id.* at 611–12. The corporation's defense was based on the family owners' religious beliefs as implemented

through the company. *Id.* at 619. Declining to separate the two artificially, the Ninth Circuit held that because the company was "an extension of the beliefs of" its owners, there was no distinction between their free exercise rights and those of the corporation. *Id.* at 620. The Ninth Circuit accordingly went on to assess whether this burden on religious exercise was the least restrictive means of accomplishing a compelling government interest. *Id.* at 620–21.

Reaffirming *Townley*, the Ninth Circuit more recently explained that "a corporation has standing to assert the free exercise right of its owners." *Stormans*, 586 F.3d at 1120. It held that a pharmacy corporation owned by the Stormans family could raise a religious objection to a state law that required the stocking of abortifacient contraceptives. *Id.* at 1120–21. Thus, the Ninth Circuit proceeded to apply *Smith*'s standard for neutral and generally applicable state laws in the absence of RFRA's strict scrutiny rule. *See id.* at 1127 (applying *Smith*, 494 U.S. at 879).

The Second Circuit followed a similar approach when it allowed an incorporated delicatessen and butcher shop owned by the Yarmeisch family to challenge kosher food-labeling laws that diverged from their specific Jewish beliefs. *See Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 210 (2d Cir. 2012). Even three decades ago, it was plain to the Minnesota Supreme Court that the argument "that a corporation has no constitutional right to free exercise of religion is unsupported by any cited authority." *McClure v. Sports & Health Club, Inc.*,

370 N.W.2d 844, 850 (Minn. 1985) (recognizing religious exercise by the family owners of a business corporation).

3. Closely-Held Corporations and Their Owners Overlap in Their Activities.

Several legal doctrines, besides religious exercise, treat closely-held corporations and their owners jointly. Tax law treats the owners of S corporations, like the Hahns, as receiving their corporation's profits (or losses) directly. 26 U.S.C. § 1363. Closely-held corporations are in this way equivalent to partnerships. One must therefore "ask why Congress would have disregarded the corporate form for subchapter S corporations but then wanted it imposed to prevent their owners from asserting free-exercise rights under RFRA. There is no good answer ...." *Gilardi v. U.S. Dep't of Health & Human Servs.*, 733 F.3d 1208, 1225 (D.C. Cir. 2013) (Randolph, J., concurring). The government's theory that corporations lack religious exercise also does not explain how to treat similar intermediate entities, such as limited liability companies and limited liability partnerships. *See Hobby Lobby*, 723 F.3d at 1135.

Our legal system does not thoroughly separate a corporation's activities from those of its owners. Company owners can be held personally liable under the Fair Labor Standards Act. *See, e.g., Irizarry v. Catsimatidis*, 722 F.3d 99, 102, 117 (2d Cir. 2013). American law also recognizes that shareholders of a company have standing to sue for a harm to the corporation when they have "a direct, personal

interest in a cause of action ... even if the corporation's rights are also implicated." *Korte v. Sebelius*, 735 F.3d 654, 667–68 (7th Cir. 2013) (quoting *Franchise Tax Bd. of Cal. v. Alcan Aluminium Ltd.*, 493 U.S. 331, 336 (1990)); *see also Gilardi*, 733 F.3d at 1216.

The First Amendment freedoms of speech and the press also honor the close connection between a company's activities and the fundamental rights of those who own it or act on their behalf. For example, the editors of the Miami Herald decide the editorial positions of the newspaper, but the corporation receives protection from government efforts to compel its speech. *See Miami Herald v. Tornillo*, 418 U.S. 241 (1974). Likewise, for-profit corporations are protected from certain requirements of state libel laws, *see N.Y. Times v. Sullivan*, 376 U.S. 254 (1964), even though individuals author any purportedly libelous materials.

Corporate owners do receive limited legal liability in some contexts. But limited legal liability is not the same as limited religious liability. What religious people do in and through their companies impacts them religiously regardless of any limited liability granted by corporate law. For instance, many religious people close their businesses on Sundays, or other days of worship, and thereby lose money regardless of whether their businesses are organized as corporations.

Refusing to recognize the religious exercise of a closely-held corporation's owners would essentially require them to choose between exercising religion or

incorporating their businesses. That rule would itself be a substantial burden on religious exercise. It would force people of faith to choose between "forfeiting [the] benefits" of limited liability by not incorporating their businesses on the one hand, and "abandoning one of the precepts of [their] religion" on the other. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). But the government cannot unlawfully condition use of the corporate form on the Hahn's relinquishment of their fundamental right to the free exercise of religion. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (recognizing that government "may not deny a benefit to a person on a basis that infringes on his constitutionally protected interests.")

RFRA and the First Amendment "endow upon the citizens of the United States the unalienable right to exercise religion, and that right is not relinquished by efforts to engage in free enterprise under the corporate form." *Beckwith Elec. Co. v. Sebelius*, No. 8:13-cv-0658, __ F. Supp. 2d __, 2013 WL 3297498, at *13 (M.D. Fla. June 25, 2013).

Indeed, the Hahns have exercised their religion through Conestoga for decades. The company's religiously-motivated decisions are the Hahns' decisions, and burdens on the company's religious liberties are burdens on the Hahns' religious liberties. Respondents would have this Court hold that the Hahns are neither responsible for those religious decisions nor harmed by those burdens because Conestoga is an independent corporate entity. But they would also insist that Conestoga is not responsible for its actions or harmed by the

Mandate because it is an ephemeral legal fiction that cannot exercise faith.

Neither is true, and the government cannot have it both ways. Although Petitioners disagree with the D.C. Circuit's conclusion that closely-held companies cannot exercise religion, it was correct to observe that "[i]f the compan[y] ... cannot engage in religious exercise—we are left with the obvious conclusion: the right belongs to the [family owners]." *Gilardi*, 733 F.3d at 1216. The Hahns have made longstanding religious decisions in owning and operating Conestoga and have directed Conestoga to exercise religion as well.

B. Conestoga Also Exercises Religion.

Even if the religious activity of the Hahns and their business could be separated, Conestoga exercises religion itself in concert with the Hahns. Indeed, religious exercise and pursuing profit through business are just two of many activities that corporations may pursue.

1. Congress Explicitly Recognized Religious Exercise by Corporations.

The Dictionary Act provides that "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. This definition of "person" "determin[es] the meaning of any Act of Congress, unless the context indicates otherwise." *Id.*

Congress, in enacting RFRA, did not exclude

corporations from its scope. It protected "any" exercise of religion. 42 U.S.C § 2000bb-2(4); *id.* § 2000cc-5(7)(A). RFRA did not define the term "person" in relation to those capable of religious exercise. *Id.* § 2000bb-1(a). Instead, Congress chose to rely upon the Dictionary Act's definition, including not only "corporations," but also "firms" and "partnerships" within its ambit. 1 U.S.C. § 1.

Nothing in RFRA's context "indicates otherwise." *Id.* On the contrary, RFRA's definition of religious exercise cross-references the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *See* 42 U.S.C. § 2000bb-2(4). RLUIPA in turn notes that both "person[s] and "entit[ies]" can exercise the religious rights it grants. *Id.* § 2000cc-5(7)(B). "[E]ntit[ies]," of course, naturally includes corporations and in no way distinguishes corporations based on their profit motive. *Hobby Lobby*, 723 F.3d at 1129 n.6. Thus, when read together with the Dictionary Act, RFRA protects Conestoga's right to religious free exercise.

2. If Non-Profit Corporations Exercise Religion, So May Their For-Profit Counterparts.

Free Exercise Clause jurisprudence reinforces the conclusion that corporations can exercise religion. Time and again this Court has recognized that corporations exercise First Amendment rights in general and religion in particular. *See* Pet. 10. It has extended this recognition to churches, schools, hospitals, charities, and other artificial entities incorporated under state law. *See, e.g.*, *EEOC v.*

Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769, 772 (6th Cir. 2010) (an "ecclesiastical corporation"), *rev'd by* 132 S. Ct. 694 (2012); *O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 973 (10th Cir. 2004) (en banc) ("a New Mexico corporation"), *aff'd*, 546 U.S. 418 (2006).

Lower courts have traditionally recognized that business corporations can assert free exercise rights, either independently or as proxies for their owners. *See supra* Part I.A.2; *see also Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cnty.*, 450 F.3d 1295, 1305 (11th Cir. 2006) (stating that "corporations possess Fourteenth Amendment rights of ... the free exercise of religion" through the "doctrine of incorporation").

By the time Congress enacted RFRA, it was also well established that religious exercise may occur in both business and employment. *Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 146 (1987); *Lee*, 455 U.S. at 256–57; *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716–18 (1981); *Sherbert*, 374 U.S. at 403–06; *Braunfeld*, 366 U.S. at 606. In light of the Dictionary Act, as well as prevailing case law, Congress plainly expected RFRA to apply to businesses and corporations.

Churches, schools, hospitals, charities, and the like are artificial persons, conferring limited liability, and organized by natural persons to pursue religious ends. This Court has never suggested that corporations cannot exercise religion because of those characteristics. The court below was thus

surely wrong to suggest that religion is a "purely personal" right under the Constitution. Pet. App. at 17a–19a. If that were true, even the handful of corporations that the government recognizes are religious would be bereft of any free exercise rights. *See Bellotti*, 435 U.S. at 778 n.14 (observing purely personal rights are "unavailable to corporations"); *White v. United States*, 322 U.S. 694, 698 (1944) (declaring purely personal rights "apply[] only to natural individuals").

Furthermore, corporations may exercise First Amendment rights even though they act on behalf of their principals. This Court has already held that "First Amendment protection extends to corporations." *Citizens United*, 558 U.S. at 342 (collecting authorities). Corporations no more engage in speech "separate and apart" from their owners than they engage in the exercise of other ideas and principles, such as religion. *Hobby Lobby*, 723 F.3d at 1136 (quotation omitted).

The freedom of association also protects individuals' ability to "join together in a common effort to assert legal rights." *NAACP v. Overstreet*, 384 U.S. 118, 124 (1966). From time immemorial, religious institutions and guilds have both been "organized as corporations at common law and under the King's charter." *Citizens United*, 558 U.S. at 388 (Scalia, J., concurring). Corporations provide a legal vehicle for such joint activity.

Corporations have constitutional rights not because they have hearts and minds "but because the people who form and operate them do," even

when they choose to "operate through the particular form of association called a corporation." Pet App. 50a n.14. Hence, it is "well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978); *see also Korte*, 735 F.3d at 681–82 (citing corporations' Fourth and Fourteenth Amendment rights).

3. Corporations May Simultaneously Earn Profit and Pursue Religion.

Earning profit is consistent with exercising religion. Many of this Court's cases demonstrate that religion can be jointly exercised through business entities. In *Lee* and *Braunfeld*, for instance, this Court accepted the free exercise interests of those engaged in profit-making ventures, including farm work, carpentry, and the sale of clothing and home furnishings. *Lee*, 455 U.S. at 254, 257; *Braunfeld*, 366 U.S. at 601, 603. "If moneymaking were enough to foreclose [a religious exercise] claim, the Court [in *Braunfeld* and *Lee*] would not have addressed the burden on ... free-exercise rights or the [government's countervailing] interest[s]." *Korte*, 735 F.3d at 680.

Corporations pursue a variety of goals. Many of them have little or nothing to do with profit, such as corporate measures to protect the environment, promote fairness to workers, encourage charitable giving, and even promote adoption. No law excludes religion from this list.

Categorically excluding corporations, or even for-

profit corporations, from religious exercise would radically narrow the scope of the First Amendment. This Court has repeatedly upheld the First Amendment rights of for-profit corporations in other contexts, such as the free-speech rights of publishers. *See, e.g., N.Y. Times Co.*, 376 U.S. at 256 (granting a First Amendment free-speech shield against libel suit to "a New York corporation"); *see also Citizens United*, 558 U.S. at 354 (forbidding the government to "suppress[] the speech of manifold corporations, both for-profit and nonprofit").

First Amendment rights "are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak." *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 801 (1988); *see City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("Of course, the degree of First Amendment protection is not diminished merely because the ... speech is sold rather than given away."). "[A] great deal of vital" and constitutionally protected expression "results from an economic motive." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011).

4. State Law Allows Business Corporations to Pursue Religion.

State law defines the proper scope of corporate activity. *See Santa Fe Indus., Inc v. Green*, 430 U.S. 462, 479 (1977). All fifty states and the District of Columbia allow corporations to pursue any lawful purpose to the same extent an individual may do so. *See* App. 27–41. The laws of Pennsylvania, under which Conestoga is incorporated, adopt this

universally agreed standard, granting a business corporation "the legal capacity of natural persons to act." 15 PA. CONS. STAT. § 1501. As religious exercise is undoubtedly legal and natural persons engage in that activity every day, so too can Pennsylvania corporations.

Many corporate executives now rightly "insist that corporations can and should advance values beyond the balance sheet and income statement." *Hobby Lobby*, 723 F.3d at 1147 (Hartz., J., concurring). For example, Pennsylvania law authorizes Conestoga to pursue any lawful purpose that a natural person may pursue. 15 PA. CONS. STAT. § 1301. Conestoga has made religion its business to the extent it has adopted and pursued religious goals. That is not changed by the government's facile description of Conestoga as a "secular" corporation. Nothing in Conestoga's corporate articles or state law confines the corporation to "secular" purposes. 15 PA. CONS. STAT. §§ 1301, 1501; App. 72–93.

The government's "secular" verbiage cannot purge corporations of the ability to engage in religious activity any more than its repeated intonation of education's "secular" and "public" nature deprived Hosanna Tabor of its right to select ministers to teach at its elementary school. 132 S. Ct. at 708. There, as here, the government sought to limit sharply the scope of religious free exercise, but this Court rejected its unprecedented contentions.

Simply put, the government cannot cordon off areas of life from the religious sphere, nor may it

impose a secular definition on business conducted through the corporate form. *Id.* at 704 (recognizing government's wholesale exclusion from matters "of faith and doctrine" (quotation omitted)). What the government's "secular" diction really entails is forcing business owners and professionals to surrender their First Amendment rights at the marketplace gate. But the marketplace is not a "'First Amendment Free Zone.'" *Bd. of Airport Comm'rs of the City of L.A. v. Jews for Jesus*, 482 U.S. 569, 574 (1987).

Society benefits when business corporations pursue religious ends and charitable causes, or even practice basic ethics. Such benefits would be jeopardized if corporations could focus solely on pursuing profit. But if incorporated businesses may exercise ethical principles, it follows that they may exercise religion, too. Any other view would amount to forbidden viewpoint discrimination. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 n.2 (2001) (recognizing government cannot burden private groups based on their "religious perspective").

5. Outside of the Tax Context, No Meaningful Distinction Exists Between For-Profit and Non-Profit Corporations.

A distinction between for-profit and non-profit corporations cannot be imposed in the arena of religious exercise. Though tax law distinguishes "for-profit" and "non-profit" corporations, most incorporation statutes and other areas of law do not. Plainly, both for-profit and non-profit corporations

produce income. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 746 (9th Cir. 2010) (Kleinfeld, J., concurring) ("Nonprofit status affects corporate governance, not eleemosynary activities.... 'For profit' and 'nonprofit' have nothing to do with making money."). The Internal Revenue Code's difference in its tax treatment of for-profit and non-profit entities cannot dictate the content of the First Amendment's Free Exercise Clause. *See Hobby Lobby*, 723 F.3d at 1135–36.

The fundamental difference between a for-profit and a non-profit corporation is not its income generation or its tax rate, but the fact that for-profits' revenue may inure to the benefit of private persons, while non-profits' returns cannot. Steven J. Willis, *Corporations, Taxes, and Religion: The* Hobby Lobby *and* Conestoga *Contraceptive Cases*, 65 S.C. L. REV. __ (manuscript at 61–63) (forthcoming 2014), *available at* http://ssrn.com/abstract=2254936 (last visited Jan. 9, 2014). This difference actually bodes in favor of identifying Conestoga's activities as personal to the Hahns because it demonstrates that they are free to imprint their own religious exercise within Conestoga itself.

II. The Mandate's Application to Petitioners is Subject to Strict Scrutiny Under Both RFRA and the Free Exercise Clause.

A. Because the Mandate Substantially Burdens Petitioners' Religious Exercise, RFRA Subjects It to Strict Scrutiny.

Under RFRA, any government measure that

substantially burdens religious exercise must satisfy the compelling interest test, even if it results from a neutral rule of general applicability. 42 U.S.C. § 2000bb-1. The Mandate imposes a substantial burden on Petitioners' free exercise of religion. RFRA thus subjects it to strict scrutiny.

1. The Mandate Substantially Burdens the Hahns' and Conestoga's Religious Exercise.

The Mandate is a quintessential "substantial burden" on religious exercise. It not only prohibits an action required by the Hahns' and Conestoga's religious beliefs (*i.e.*, refraining from providing healthcare coverage for abortifacient items), but also imposes severe penalties for noncompliance. And, critically, the baseline for measuring a substantial burden is the degree of governmental pressure applied to coerce compliance, not the theological weight of Petitioners' exercise of religion.

a. The Government's Special Rules for Religious Organizations Show that It Believes the Mandate Imposes a Substantial Burden.

Even the government has acknowledged that the Mandate would burden certain employers' religious exercise. The government created exemptions and other rules for non-profit groups, expressing its desire to shield the "the religious beliefs of certain religious employers." 77 Fed. Reg. at 8,726; 45 C.F.R. § 147.130(a)(1)(iv)(A).

Notwithstanding those rule's merits, the

government's creation of an exemption backhandedly concedes that the Mandate cognizably burdens an employer's free exercise rights. As Judge Jordan explained below, "if the indirectness of the ultimate decision to use contraceptives truly rendered insubstantial the harm to an employer, then no exemptions to the Mandate would be necessary. The harm to the Catholic Church by one of its employees' decision to use an abortifacient would be equally as indirect" as that alleged here. Pet. App. 77a. Yet, Respondents exempted church plans from the Mandate.

b. RFRA's "Substantial Burden" Standard Measures the Degree of Government Pressure to Violate One's Religious Beliefs, Not Theological or Moral "Attenuation."

RFRA asks whether the *burden* on religious exercise is "substantial." It does not ask whether Petitioners' religious exercise or moral calculus is substantial. Courts are simply not empowered to determine whether a religious practice is "compelled by, or central to, a system of religious belief." 42 U.S.C. §§ 2000bb-2(4), 2000cc-5(7)(A). "[I]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Smith*, 494 U.S. at 887 (quotation omitted).

Petitioners are not asserting an objection to others' use of abortifacient items. Other people are free to purchase those items themselves, or the

government may freely give them out. Petitioners instead challenge the government's mandate that *they* pay for coverage of those items in *their* company's healthcare plan in direct violation of *their* religious beliefs. Pet. App. 10g–11g, 16g–17g. No space exists between Petitioners' religious beliefs and what the Mandate forces them to do. The only way to avoid violating the Mandate and incurring ruinous fines is for Petitioners to violate their religious principles. *See, e.g.*, *Korte*, 735 F.3d at 685 (recognizing "the religious-liberty violation at issue here inheres in the *coerced coverage* of ... abortifacients ... and related services" (quotation omitted)).

The free exercise question is not whether the government or even a "reasonable observer would consider [Petitioners] complicit in an immoral act, but rather how [Petitioners] themselves measure their degree of complicity." *Hobby Lobby*, 723 F.3d at 1142.

c. *Thomas* Demonstrates that the Substantial Burden Inquiry Cannot be a Measure of the Believer's Moral Complicity.

This Court's decision in *Thomas* precludes the government's view that a burden's substantiality can be measured by second-guessing a believer's moral calculus. In that case, a man who religiously objected to war asserted a conscientious objection to making turrets for tanks, even though he was willing to fabricate sheets of steel that could later be used to make armaments. *Thomas*, 450 U.S. at 710. When

his employer transferred him to the turret factory, Thomas quit his job and applied for unemployment benefits. *Id.* The state denied Thomas' application, viewing his objection as "more 'personal philosophical choice' than religious belief." *Id.* at 713. Further, it viewed even a voluntary "termination motivated by religion" as falling short of the standard for receiving unemployment benefits, *i.e.*, "'good cause' objectively related to [one's] work." *Id.*

This Court reversed and noted that free exercise claims do not turn on the state's "perception of the particular belief or practice in question." *Id.* at 714. Government approval of the logic, consistency, or even comprehensibility of religious beliefs is not required to merit First Amendment protection. *Id.* Nor may the state require that all members of a religious sect believe in the same way. *Id.* at 715–16. Whether the claimant's activities are "sufficiently insulated" from religious offense is his decision, not the government's or the court's. *Id.* at 715.

All the government may do is examine whether the person claiming free exercise protection has "an honest conviction" that a particular activity is "forbidden by his religion." *Id.* at 716. When Thomas sincerely determined that his religion precluded manufacturing tank turrets, this Court accepted that belief without question, stating: "Thomas drew a line, and it is not for us to say that the line he drew was an unreasonable one. Courts should not undertake to dissect religious beliefs ...." *Id.* at 715.

Just as in *Thomas*, Petitioners' religious beliefs should be taken at face value if they are sincere. *See*

Lee, 455 U.S. at 257 (rejecting the government's claim that social security taxes would "not threaten the integrity of the Amish religious belief or observance"). And here, no one disputes that they are. Pet. App. 30a, 26b. Thus, the government cannot assert that "attenuation" weakens the burden on Petitioners' religious exercise, either due to the nature of insurance coverage or the alleged separation between closely-held corporations and their owners.

As Judge Jordan observed below, Petitioners "are entitled, just as much as Thomas was, to make judgments about when their connection with the acquisition and use of contraceptives becomes close enough to contravene their faith." *Id.* at 77a. The First Amendment precludes government from serving as the "arbiter[] of scriptural interpretation." *Thomas*, 450 U.S. at 716; *see also United States v. Ballard*, 322 U.S. 78, 87 (1944) (explaining the Constitution makes "[m]an's relation to his God ... no concern of the state"). Substantial burden analysis therefore does not involve "an inquiry into the theological merit of the belief in question" but "the *intensity of the coercion* applied by the government to act contrary to those beliefs." *Hobby Lobby*, 723 F.3d at 1137 (emphasis in original).

Because the substantial burden standard measures government pressure rather than moral "attenuation," the significant penalties attached to the Mandate make it "difficult to characterize the pressure placed on Petitioners as anything but substantial." *Hobby Lobby*, 723 F.3d at 1140; *see also Gilardi*, 733 F.3d at 1217–18.

2. The Mandate Substantially Burdens the Hahns' Free Exercise of Religion.

A burden on religious exercise can be "substantial" in several ways. The most straightforward scenario is where a government action "directly compel[s]" a religious adherent to violate her beliefs, *Sherbert*, 374 U.S. at 403, or "make[s] unlawful the religious practice itself," *Braunfeld*, 366 U.S. at 606. *See also Thomas*, 450 U.S. 717 (describing this variety as a "*compel[led]* ... violation of conscience") (emphasis in original).

Government "pressure" may also constitute a substantial burden on the free exercise of religion. For instance, Sherbert was not governmentally required to work on her Sabbath. 374 U.S. at 403. But the "indirect" burden on her religious exercise caused by the state's denial of unemployment benefits constituted a substantial burden. *Id.* at 404; *see also Thomas*, 450 U.S. at 718 (recognizing that "compulsion may be indirect" and "nonetheless substantial").

In practical terms, this denial of benefits placed "pressure upon [Sherbert] to forego" the "practice of her religion" in the same way that would result from a government "fine imposed against [her] for ... Saturday worship." 374 U.S. at 404. Hence, "substantial pressure on an adherent to modify his behavior and to violate his beliefs" may also constitute a substantial burden on religious exercise. *Thomas*, 450 U.S. at 718.

a. The Mandate Directly Compels and Exerts Substantial Pressure on the Hahns to Violate Their Religious Beliefs.

The Mandate imposes a substantial burden on the Hahns through both direct compulsion and substantial pressure. Indeed, the Mandate meets the definition of a "compelled violation of conscience" by directly requiring the Hahns to include abortifacient items in their healthcare plan, which they intentionally excluded to comply with their religious beliefs. *See* 42 U.S.C. § 300gg-13(a) (requiring that Petitioners' healthcare policy "provide coverage for and shall not impose any cost sharing requirements for" contraceptives with abortifacient effects). No one can implement this requirement except the Hahns themselves.

Penalties imposed for refusing to comply with the Mandate also substantially pressure the Hahns. The Mandate imposes three types of penalties for non-compliance. Omitting abortifacient items from the Hahns' healthcare plan would subject them to fines reaching $100 per plan participant per day. 26 U.S.C. § 4980D(b)(1). Such noncompliance would also subject the company to lawsuits under ERISA. 29 U.S.C. § 1132(a). And if the Hahns dropped their healthcare plan altogether, they would not only deprive employees of their insurance plan, but would also trigger yearly fines approximating $2,000 per employee, 26 U.S.C. § 4980H(c)(1), subject Conestoga to additional costs involved in aiding employees' individual purchase of insurance, and put the company at a competitive disadvantage in the

marketplace.

The pressure imposed by the Mandate thus prohibits the Hahns from continuing to run their family business in keeping with the tenets of their faith. Choosing between saving their company from "ruinous fines ... and following the moral teachings of their faith ... is at least as direct and substantial a burden," *Korte*, 735 F.3d at 684, as those involved in *Hobbie*, *Sherbert*, *Thomas*, and *Lee*. In the D.C. Circuit's words in a related case, the Hahns

> can either abide by the sacred tents of their faith, pay a penalty of [outsized proportions], and cripple the compan[y] they have spent a lifetime building, or they become complicit in a grave moral wrong. If that is not "substantial pressure on an adherent to modify his behavior and to violate his beliefs," [it is hard] to see how that standard could be met.

Gilardi, 733 F.3d at 1218.

b. The Mandate May Formally Apply to Conestoga, but the Hahn Family Must Implement It.

The Third Circuit erred in concluding that the Mandate does not affect the Hahns. *See* Pet. App. 26a. Even though the Mandate is directed towards Conestoga, the Hahn family members are the only people who can implement it. As the voting shareholders who also control the board of directors and the management of the company, they are responsible for putting the Mandate's requirements into effect. It is the Hahns who must contract for

Conestoga's healthcare coverage. And if Conestoga violates the Mandate or drops its employees' healthcare plan, it is the Hahns who will watch their business and employees suffer.

The Hahns only way out is to sell their business and make room for owners with different beliefs. But this alternative also exerts substantial pressure because it compels the Hahns, and thousands of religious people of like them, to exit the world of business altogether. Such a Hobson's choice is, by definition, a substantial burden: it "forces [the Hahns] to choose between following the precepts of [their] religion and forfeiting" the benefit of participating in the business world, "on the one hand, and abandoning one of the precepts of [their] religion in order to [own a business], on the other hand." *Sherbert*, 374 U.S. at 404.

c. The Penalties on Conestoga Pass Through to the Hahns.

The monetary penalties for non-compliance with the Mandate exert significant pressure upon the Hahns as business owners. Conestoga is the Hahns' property. A government fine on a citizen's property is a burden on the citizen himself. *Cf. Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 539 (2005) (determining whether a regulatory taking has occurred by reference to "the severity of the burden that government imposes upon private property rights"). The government could not, for example, make an end run around religious liberty by simply imposing a lien on a religious citizen's house, as opposed to fining him "directly." In the same vein,

government fines on Conestoga substantially burden the Hahns.

Further, Conestoga is an S corporation. Pet. App. 3h–5h. Its profits and losses pass directly through to the Hahn family. *See* 26 U.S.C. § 1363. Any fines Conestoga incurs for violating the Mandate likewise pass through to the Hahns. *See Gilardi*, 733 F.3d at 1225. As Judge Jordan observed below, "one need not have looked past the first row of the gallery during the oral argument of this appeal, where the Hahns were seated and listening intently, to see the real human suffering occasioned by the government's determination to either make the Hahns bury their religious scruples or watch while their business gets buried." Pet. App. 31a. Conestoga does not function autonomously but acts only as the Hahns direct it. Penalties imposed on Conestoga substantially burden both the Hahns' finances and their faith.

3. The Mandate Substantially Burdens Conestoga's Free Exercise of Religion.

Because Conestoga itself exercises religion, there can be no real dispute that the Mandate substantially burdens the company. The Third Circuit, for example, recognized that the Mandate's underlying requirement and its penalties apply directly to Conestoga. Pet. App. 26a–27a.

The Mandate renders "unlawful the religious practice itself," *Braunfeld*, 366 U.S. at 606, by directly requiring Conestoga to provide abortifacient coverage. This is a prototypical substantial burden. Moreover, the Mandate substantially pressures

Conestoga. For example, the mere denial of unemployment benefits was enough in cases like *Sherbert*, 374 U.S. at 404–06. The heavy fines and penalties attached to the Mandate far surpass such pressure. *See also Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (characterizing a mandate and fine as "not only [a] severe, but inescapable" burden on religious beliefs).

B. Under the Free Exercise Clause, Strict Scrutiny Applies Because the Mandate Is Neither Neutral nor Generally Applicable.

Although Petitioners need not show the Mandate's general inapplicability or non-neutrality under their RFRA claim, the Free Exercise Clause's protections apply on both fronts and trigger strict scrutiny. "[B]elief and action cannot be neatly confined in logic-tight compartments." *Yoder*, 406 U.S. at 220. Accordingly, the Free Exercise Clause "not only forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship but also safeguards the free exercise of the chosen form of religion." *Ballard*, 322 U.S. at 86 (quotation omitted). Its purpose, like that of the First Amendment as a whole, is to allow "the widest possible toleration of conflicting views." *Id.* at 87.

Smith established that burdens on religiously-motivated conduct are subject to strict scrutiny under the Free Exercise Clause when a regulation lacks neutrality or general applicability. 494 U.S. at 879. Both are missing here.

1. The Mandate is Selective, Not Generally Applicable.

Unlike in *Smith*, which involved an "across-the-board criminal prohibition on a particular form of conduct," 494 U.S. at 884, the Mandate here falls short of general applicability. The ACA creates a vast system of categorical exemptions that frees thousands of employers from the Mandate's scope. *See* Pet. App. 84a (summarizing various exemptions).

As discussed below in Part III.D, the Mandate exempts plans encompassing tens of millions of women who are covered by "grandfathered" healthcare plans. Through the "comprehensive" authority Congress gave Respondents to create religious exemptions, churches and their integrated auxiliaries are exempt from the Mandate's scope. Respondents also "accommodate" non-profit religious groups and refuse to apply the Mandate's penalties to hundreds of non-profit religious groups in plans that are exempt from ERISA, despite having asserted that the women in those plans need to receive contraceptive coverage. They also fail to penalize small businesses for dropping employee coverage and allow the Mandate's purported benefits to pass over certain religious sects and participants in health sharing ministries. Despite all these exemptions, the government refuses to exempt religious families in business.

Such "categories of selection are of paramount concern when a law has the incidental effect of burdening religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 542

(1993). Indeed, "categorical" exclusions exacerbate concerns regarding the discriminatory potential of "'individualized exemptions.'" *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 365 (3d Cir. 1999) (Alito, J.). Here, the government's exemptions for secular and religious reasons, in tandem with its arbitrary decision not to extend an exemption to Petitioners, demonstrate that the Mandate is selective, not comprehensive, in nature. *See Lukumi*, 508 U.S. at 543 (noting a lack of general applicability when a regulation "fail[s] to prohibit nonreligious conduct that endangers [the government's] interests in a similar or greater degree").

This lack of general applicability justifies strict scrutiny of the Mandate under the Free Exercise Clause. *See id.* at 546. The government cannot refuse to extend a system of exemptions "to cases of 'religious hardship' without compelling reason." *Id.* at 537 (quotation omitted); *Smith*, 494 U.S. at 884 (quotation omitted). But that is precisely what the government seeks to do here. The First Amendment "protects religious observers against [such] unequal treatment." *Lukumi*, 508 U.S. at 542 (quotation and alteration omitted); *see also Gillette v. United States*, 401 U.S. 437, 461 (1971) ("[T]he Free Exercise Clause no doubt has a reach of its own.").

2. The Government's Application of the Mandate is Not Neutral.

The Mandate also fails this Court's neutrality test. Refusing to exempt Petitioners from the Mandate in the face of numerous exceptions

"devalues [their] religious reasons" for objecting to assisting in the destruction of embryonic life. *Lukumi*, 508 U.S. at 537.

Providing secular exemptions "while refusing religious exemptions is sufficiently suggestive of discriminatory intent so as to trigger heightened scrutiny under *Smith* and *Lukumi*." *Fraternal Order of Police*, 170 F.3d at 365. Likewise, "it seems less than neutral to say that some religiously motivated employers—the ones picked by the government—are exempt while others are not." Pet. App. 88a–89a; *see also Fowler v. Rhode Island*, 345 U.S. 67, 69 (1953) (noting the dangers inherent in "the state preferring some religious groups over this one").

Discrimination is inherent in the Mandate's departure from "our happy tradition of avoiding unnecessary clashes with the dictates of conscience." *Gillette*, 401 U.S. at 453 (quotation omitted). Petitioners have suggested a variety of ways in which the government could "accomplish its secular goals without even remotely or incidentally affecting religious freedom." *Braunfeld*, 366 U.S. at 608; *see infra* Part III.F. But Respondents have declined to give them any meaningful consideration.

Indeed, Congress authorized "comprehensive" religious exemptions, *see* 76 Fed. Reg. at 46,623, and Respondents chose to exempt churches, create an "accommodation" for non-church non-profits, and refrain from penalizing many of those non-church plans for avoiding the Mandate altogether. 78 Fed. Reg. at 39,870. Yet, when Petitioners asserted a religious objection of the same quality based on the same

religious beliefs, Respondents refuse to acknowledge the harm to Petitioners' exercise of religion.

By engaging in such arbitrary line drawing between religious people and organizations, and by offering secular exemptions that encompass tens of millions of women, the government has failed to pursue its proffered objectives "with respect to analogous non-religious conduct," as well as to identical conduct by other religious actors whom the government views with a more favorable eye. *Lukumi*, 508 U.S. at 546.

The "risks" caused by existing exemptions from the Mandate "are the same" as those posed by the exemption requested here. *See id.* at 544. The millions of women covered by grandfathered plans have no less "need" for the Mandate's benefits than women covered by Conestoga's plan. And the government itself asserted that women working at non-church religious groups needed to receive contraception in a roundabout way through its "accommodation." 78 Fed. Reg. at 39,874. Yet, it refrained from penalizing hundreds of such plans that are exempt from ERISA.

The First Amendment prevents Petitioners from "being singled out for discriminatory treatment" by Respondents' refusal to grant them an exemption that would have no worse effects than those already approved. *Lukumi*, 508 U.S. at 538. Indeed, Respondents cannot give a nondiscriminatory reason why Petitioners' free exercise of religion must bear the weight of the Mandate when their own voluntary measures place thousands of other employers

outside of its scope. *Cf. id.* at 544.

Because the Mandate hinders "much more religious conduct than is necessary in order to achieve the legitimate ends asserted in [its] defense," it is "not neutral." *Id.* at 542; *see also Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004) (Alito, J.) (explaining that for a law to be "neutral" it must "not target religiously motivated conduct either on its face or as applied in practice"). This lack of neutrality subjects the Mandate to "the most rigorous of scrutiny." *Lukumi*, 508 U.S. at 546.

3. Strict Scrutiny Applies Regardless of Whether the Mandate's Burden is "Substantial."

Although the Mandate's burden on Petitioners' religious exercise is "substantial," *see supra* Part II.A.2, the Mandate's non-neutrality and non-general applicability subject it to strict scrutiny regardless of its weight on Petitioners' exercise of religion. *See Lukumi*, 508 U.S. at 546; *Blackhawk*, 381 F.3d at 209 (Alito, J.) (recognizing strict scrutiny applies once non-general applicability or non-neutrality is established); *accord Hartmann v. Stone*, 68 F.3d 973, 979 n.3 (6th Cir. 1995); *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3d Cir. 1994).

III. The Mandate Cannot Survive Strict Scrutiny as the Government Pursues Its Interests Haphazardly and Already Uses Less Restrictive Means to Achieve the Same Ends.

Under strict scrutiny, "a law restrictive of religious practice must advance interests of the

highest order and must be narrowly tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quotations omitted). This "compelling interest standard ... is not watered down but really means what it says." *Id.* (quotations and alterations omitted). Indeed, strict scrutiny imposes "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

The Mandate fails both components of this test. The interests of "equality" and "health" it ostensibly furthers are generic, inconsistently pursued, and unsupported by evidence showing the Mandate causes them to a compelling degree. And the government could uses less restrictive means to achieve those ends because it already pursues such means extensively.

A. The Government Misconstrues Equality.

The government's arguments repeatedly confuse citizens' freedom *from* government interference with freedom *for the government to interfere* in citizens' lives. As this Court has recognized, the Founders "conferred, *as against the government*, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Griswold v. Connecticut*, 381 U.S. 479, 494 (1965) (Goldberg, J., concurring) (quotation omitted) (emphasis added).

It is therefore ironic that the government justifies its interest in "equality" by citing the constitutional right to privacy. Appellee Br. at *34–37, *Conestoga Wood Specialties Corp. v. Sebelius*, 274 F.3d 377 (2013) (No. 13-1144), 2013 WL 1752562 (3d Cir. filed

Apr. 15, 2013). Privacy is a right against *government* interference. It has never been applied to coerce private citizens to fund abortion or contraception. It does not even require the government to fund such activities. *See Rust v. Sullivan*, 500 U.S. 173, 192–93 (1991) ("A refusal to fund protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity."); *see also id.* (discussing *Maher v. Roe*, 432 U.S. 464, 474 (1977), and *Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980)).

This Court has consistently recognized that private citizens are free not to participate in other citizens' privacy-related services. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 197–98 (1973) (approving exemptions for conscientious objectors). "[A] woman's right to an abortion or to contraception does not compel a private person or entity to facilitate either." *Planned Parenthood Ariz., Inc. v. Am. Ass'n of Pro-Life Obstetricians & Gynecologists*, 257 P.3d 181, 196 (Ariz. Ct. App. 2011).

Likewise, the prohibition on sex discrimination in Title VII, as amended by the Pregnancy Discrimination Act of 1978, does not require insurance coverage of contraception. *See In re Union Pac. R.R. Emp't Practices Litig.*, 479 F.3d 936, 943 (8th Cir. 2007). And the fact that grandfathered plans under the ACA have a "right" to maintain their status indefinitely, depriving millions of women of the Mandate's asserted benefits, 42 U.S.C. § 18011, severely undermines the notion that delivery of the Mandate is itself an equality right.

Granting Petitioners an exemption to the

Mandate will not make contraception illegal or stop the government from funding it. But refusing them one would fundamentally redefine "equality" and alter this Court's privacy jurisprudence. It would establish a "compelling interest" to force citizens to buy contraceptive and abortifacient items for their fellow citizens, even when such purchases violate their religious beliefs.

That power would dramatically shift the balance struck in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Gonzales v. Carhart*, 550 U.S. 124 (2007), where this Court recognized ample freedom for citizens and the government to refrain from promoting activities protected by this Court's privacy jurisprudence It would also threaten forty years of statutory conscience protections in the areas of abortion and family planning. *See, e.g.*, 42 U.S.C. § 300a-7; MD. CODE., HEALTH-GEN. § 20-214.

"Federal commandeering" is disfavored even in relation to state governments. *Printz v. United States*, 521 U.S. 898, 925 (1997); *see also New York v. United States*, 505 U.S. 144, 161 (1992). Private citizens are all the more shielded from the federal government's efforts to commandeer them to implement its interests. No right to privacy or equality represents a compelling interest capable of forcing private citizens to buy abortifacient contraceptive coverage for others.

B. The Government's Interests Are Too Broadly Formulated.

The government's assertion of both "health" and

"equality" interests fail because they are "broadly formulated," *Hobby Lobby*, 723 F.3d at 1143 (quotation omitted), and operate only at "a high level of generality." *Korte*, 735 F.3d at 686.

For a government interest to be compelling, it must combat "the gravest abuses, endangering paramount interest[s]." *Sherbert*, 374 U.S. at 406 (quotation omitted). But an interest that is framed generically is insufficient to satisfy strict scrutiny. *O Centro Espirita*, 546 U.S. at 430–31. Even the "'paramount'" state interest in education, for instance, could not justify a burden on religious exercise when stated broadly. *Id.* at 431 (quoting *Yoder*, 406 U.S. at 213); *see also Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011) (recognizing the government must "identify an actual problem in need of solving, and the curtailment of [the right] must be actually necessary to the solution") (citations and quotation omitted).

The government cannot justify the Mandate by relying on generic studies about contraception. According to the government's sources, 89% of women who are at risk of unintended pregnancy are already using contraception, and an even higher percentage of healthcare plans already cover it. *See* Guttmacher Inst., *Facts on Contraceptive Use in the United States* (Aug. 2013), *available at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Jan. 9, 2014) [hereinafter "Facts on Contraceptive Use"]; App. 60. This leaves only a "marginal percentage point by which the government's goals are advanced," *Brown*, 131 S. Ct. at 2741, which cannot render its generic health

interest compelling.

Nor is it telling, as the government suggests, that women pay more for preventive services than men do. The ACA erases most of this gap, much of which is completely unrelated to contraception, by requiring coverage of preventive services generally and women's preventive services specifically. These include breastfeeding supplies, well-woman visits, and screenings for cancer and blood pressure, among others. 42 U.S.C. § 300gg-13(a) (listing other preventive services); U.S. Preventive Services Task Force, *A and B Recommendations*, *available at* http://www.uspreventiveservicestaskforce.org/uspstf/uspsabrecs.htm (last visited Jan. 9, 2014) (same); HRSA, *Women's Preventive Services Guidelines*, *available at* http://www.hrsa.gov/womensguidelines/ (last visited Jan. 9, 2014) (same).

Conestoga does not object to providing any of those services. The government's evidence either does not specify whether the alleged cost gap for women is attributable to contraception, or admits that it concerns other procedures, such as cancer screenings and dental examinations, mammograms and Pap smears, blood pressure, cholesterol, cervical cancer, colon cancer and breast cancer screens, or the like. *See* App. 46; R. Robertson and S. Collins, *Realizing Health Reform's Potential* 8–9 (2011), *available at* http://www.commonwealthfund.org/~/media/Files/Publications/Issue%20Brief/2011/May/1502_Robertson_women_at_risk_reform_brief_v3.pdf (last visited Jan. 9, 2014). This evidence fails to "specifically identify" how the Mandate serves a compelling need *after* all non-contraceptive preventive

services are covered. *Brown*, 131 S. Ct. at 2738.

C. There is a Large Evidentiary Gap Between the Mandate and the Goals It Purports to Serve.

The Mandate also fails the compelling interest test because of the large evidentiary gap that exists between what it accomplishes and the government's goals. The Mandate is inherently a "trickle down" mechanism, which resides at a far distance from its intended goals. The Mandate is not an end in itself. To yield the government's alleged health and equality benefits, it must affect women who experience "unintended pregnancy" and cause an increased use of birth control, which would then reduce the number of unintended pregnancies and reduce the negative consequences therefrom.

At each step of this evidentiary chain, the government's "evidence is not compelling." *Brown*, 131 S. Ct. at 2739. Nearly all of the research the government cites "is based on correlation, not evidence of causation, and most of the studies suffer from significant ... flaws in methodology." *Id.* (citation and quotation marks omitted); *see generally* Helen M. Alvare, *No Compelling Interest: The 'Birth Control' Mandate & Religious Freedom*, 58 VILLANOVA L. REV. 379 (2013) (discussing the Mandate's flaws). Each evidentiary failure yields a smaller "marginal percentage point" of results. *Brown*, 131 S. Ct. at 2741 n.9.

The government's evidentiary case rests on eleven pages of a report it commissioned from the

Institute of Medicine in 2011. App. 44–62. The report is not itself a scientific study; it merely cites other studies. Walking through those citations shows that the government does not "specifically identify an 'actual problem' in need of solving," or that coercing religious objectors is "actually necessary to the solution." *Brown*, 131 S. Ct. at 2738.

First, the government alleges that its interests in health and equality are hampered by unintended pregnancy. The IOM report identifies the class of women susceptible to this dilemma as young, unmarried, undereducated, and low income. App. 50. But the government already provides low-income women with contraception through a number of existing programs. App. 42–43.

The Mandate, in the context of these challenges, is targeted at women who are provided with health insurance by their employer or are covered by an employed family member's healthcare plan. The government's evidence fails to demonstrate that these women are any more likely than most to be young, unmarried, undereducated, or low income. Consequently, there is a lack of alignment between the Mandate's scope and the class of women that the government asserts is at risk for unintended pregnancy in the first place.

Second, the government has failed to show that unintended pregnancies are caused by a lack of contraceptives or by their cost. The Guttmacher Institute ("Guttmacher"), which the IOM cites extensively, reports that 89% of women seeking to avoid pregnancy already use contraception. Facts on

Contraceptive Use; App. 60. Guttmacher has also reported that, even among at-risk populations, only 12% of women cite cost as a reason for not using contraceptives. R. Jones, J. Darroch and S.K. Henshaw, *Contraceptive Use Among U.S. Women Having Abortions*," PERSP. ON SEXUAL & REPROD. HEALTH 34 (Nov/Dec 2002) 294–303. The government has thus not shown that the Mandate will actually cause women who do not use contraception to do so.

Third, the government has provided no evidence that the Mandate will reduce the number of unintended pregnancies. Twenty-eight states have passed similar measures. App. 59. Yet, the government has not cited a single study showing that these provisions caused, or were even correlated with, a decline in unintended pregnancies.

Fourth, and equally troubling, the government does not know how to define an "unintended pregnancy." The IOM's own 1995 study, which is cited in its report on the Mandate, App. 49, 52, recognizes the fundamental uncertainty in defining this term. Inst. of Med., *The Best Intentions: Unintended Pregnancy and the Well-Being of Children and Families* 21–25 (1995) ("1995 IOM"), *available at* http://www.nap.edu/catalog.php?record_id=4903 (last visited Jan. 9, 2014) (admitting "many limitations and ambiguities" exist and explaining "the concept of intended versus unintended is more [of] a continuum"). Available data on "intent" includes reporting flaws, and extrapolates from sources that do not claim to show intent, such as abortion numbers. *Id.*; *see also* Alvare, 58 VILLANOVA

L. REV. at 396–97. "Unintended pregnancy" might also include a pregnancy that was initially unwelcomed but later desired, for which cases the government has not demonstrated harm.

Fifth, the IOM admits that "research is limited" about the health effects that flow from unintended pregnancy. App. 49. The government does not know whether the negative effects it posits are actually caused by unintended pregnancy or are "merely associated" with it. 1995 IOM at 65. "[C]ausality is difficult if not impossible to show." Jessica D. Gipson et al., *The Effects of Unintended Pregnancy on Infant, Child, and Parental Health: A Review of the Literature,* 39 STUD. FAM. PLAN. 18, 19–20, 29 (2008) (cited in App. 50). For instance, the IOM concedes mere associative links between unintended pregnancy and delay in prenatal care, 1995 IOM at 68, increases in smoking and drinking, *id.* at 69, 73, 75, and premature birth and low birth weight, *id.* at 70–71.

Importantly, the government "bear[s] the risk of uncertainty" on all of these questions, *Brown*, 131 S. Ct. at 2739, and "ambiguous proof will not suffice." *Id.* For instance, the State of California's evidence of mere correlation between violent video games and youth violence was "not compelling" because it failed to establish "a direct causal link" between the identified harm and the regulation in question. *Id.* at 2738–39. As a result, the law only "marginal[ly]" advanced the state's interests and failed strict scrutiny. *Id.* at 2741 n.9. The same is true here, particularly as granting an exemption to Petitioners—and those like them—will affect only a

small number of businesses, which is dwarfed by the number already outside of the Mandate's scope.

Overall, the Mandate was adopted "without high quality, systematic evidence" based on the personal "preferences of the [IOM] committee's composition. Troublingly, the process tended to result in a mix of objective and subjective determinations filtered through a lens of advocacy." App. 64 (dissent by Dr. Anthony Lo Sasso).

D. The Government Treats Its Interests as Optional, not Compelling.

An exemption for Petitioners will not "render[] the entire statutory scheme unworkable," *Sherbert*, 374 U.S. at 409, if for no other reason than that the government already refrains from imposing the Mandate on so many others. Pet. App. 82a–83a.

"[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." *Lukumi*, 508 U.S. at 520 (quotation and alteration omitted). Stated differently, an interest is not compelling when the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort." *Id.* at 546–47. The government, in this case, has already exempted thousands of employers from the Mandate's scope, thus depriving tens of millions of women of the "health" and "equality" interests it says are compelling. Pet. App. 82a.

Most tellingly, the government chose not to impose the Mandate on "grandfathered" health

plans. *See* 42 U.S.C. § 18011; 76 Fed. Reg. at 46,623 & n.4. The government's own data projects that these plans, even as they reduce in number, will cover tens of millions of women. 75 Fed. Reg. at 34,540–53 & tbl. 3. It also indicates that approximately 55% of large employers'—the category in which Conestoga, Hobby Lobby and Mardel fall—will have healthcare plans that are grandfathered. *Id.* And employers have a "right" to keep their grandfathered plans indefinitely, *Hobby Lobby*, 723 F.3d at 1124; *see generally* 75 Fed. Reg. 34,538, even if they make certain changes that raise employees' costs, *see, e.g.*, 45 C.F.R. § 147.140(g) (2010).

The exemptions do not end there. Respondents exempted churches, religious orders, and their integrated auxiliaries from the Mandate, and provided an "accommodation" for other non-profit groups. 45 C.F.R. § 147.131; 78 Fed. Reg. at 39,870. They also chose not to penalize hundreds of non-church religious groups exempt from ERISA, even if the Mandate's benefits are not provided. *See* Resp't Memo. in Opp. at 3, *Little Sisters of the Poor Home for the Aged v. Sebelius*, S. Ct. No. 13A691 (filed Jan. 3, 2014). And Respondents refrained from imposing penalties on these groups' plan administrators despite initially insisting that women covered by their plans needed to receive contraception under the "accommodation." 78 Fed. Reg. at 39,874. Further, the ACA does not require "small employers" with less than fifty employees to offer healthcare coverage at all. 26 U.S.C. § 4980H(c)(2)(A). The Mandate also does not reach members of certain discrete religious groups or participants in health care sharing ministries. *Id.* § 5000A(d)(2)(A)-(B).

It is simply impossible for the government to have a "paramount" need to impose the Mandate on a few religiously motivated employers, like Petitioners, when it voluntarily exempts tens of millions of women from the Mandate's scope via exemptions for thousands of nonreligious and religious employers. When the government makes even one exemption to a general ban, the findings used to support that measure cannot "preclude any consideration of a similar exception." *O Centro Espirita*, 546 U.S. at 433.

In *O Centro Espirita*, the government's ban on hallucinogenic tea was not subject to an exception. But the existence of a single exemption for peyote in another part of the controlled substances law, which encompassed over 100,000 people, showed that the government could not deny the religious exception requested. *Id.* Here, the exemptions are far more vast and varied than in *O Centro Espirita*. The government's "classic" bureaucratic rejoinder against offering a RFRA or Free Exercise exemption is thus even less plausible in this case. *Id.* at 436.

The government must show that "granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435. But it cannot do so because the government itself has "seriously compromised" the Mandate's universality.

E. *Lee* Demonstrates that the Mandate Does Not Serve Compelling Interests.

The government interest this Court identified in

Lee is not present here. In *Lee*, the government had an overriding interest in collecting any and all social security taxes. 455 U.S. at 261. Those taxes burdened the Amish employer's free exercise rights. Nevertheless, this Court upheld that burden on "commercial activity," *id.* at 261, because of the government's "interest in assuring mandatory and continuous participation in and contribution to the social security system," *id.* at 258–59.

The Mandate is distinct from *Lee* on multiple levels. *Lee* involved a problem with "accommodat[ing] religious beliefs in the area of taxation." *Id.* at 259. In that case, the government had not allowed "myriad exceptions" to "the comprehensive social security system." *Id.* at 259–60. Consequently, it could convincingly argue that the taxes to support that structure "must be uniformly applicable to all, except as Congress provides explicitly otherwise." *Id.* at 261. Here, the Mandate is anything but "uniform" and is not "binding on [all] others" engaged in the same activity as Petitioners. *Id.* at 261. Thousands of non-religious and religious employers fall outside of its scope.

Moreover, the Mandate does not require universal application, as the social security system did in *Lee*. Congress deemed it unlike other patient protections that apply to healthcare plans across the board. *See* 42 U.S.C. § 18011 (identifying provisions of the ACA that apply even if a plan is grandfathered). Indeed, Congress did not even require that contraception be included in the Mandate. *Id.* § 300gg-13(a)(4).

Nor does the Mandate equally apply "to all participants" in the national healthcare market. *Lee*, 455 U.S. at 258. Thousands of employers and tens of millions of women are already outside of the Mandate's bounds. As a result, Respondents cannot plausibly assert that adding Petitioners' desired religious exemption to the list would "radically restrict the operating latitude of the legislature." *Id.* at 259 (quotation omitted).

The *Lee* Court relied heavily on the fact that Congress determined that virtually all religious objectors' participation in the social security program was "indispensable to [its] fiscal vitality." *Id.* at 258. But Respondents cannot rely on any congressional findings in this case. Congress specifically provided them with "comprehensive" authority to implement religious exemptions. *See* 76 Fed. Reg. at 46,623. Plainly, Congress did not believe that granting such accommodations would "unduly interfere with fulfillment of the governmental interest[s]" at play. *Lee*, 455 U.S. at 259.

"Congress' unwillingness to adopt a single national policy that consistently endorses" the government's asserted interests seriously undermines the allegation that they are compelling. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 186–87 (1999). "Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority" in a manner that would "raise serious constitutional problems." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–73 (2001) (quotation omitted). But

Respondents seek to do just that here.

This Court reads statutes "to avoid such problems, unless such construction is plainly contrary to the intent of Congress." *Id.* at 173 (quotation omitted). In this case, Congress' application of RFRA to the ACA, its failure to include abortifacients in the Mandate, and its authorization of comprehensive religious exemptions all belie "that Congress intended th[e] result" that Respondents seek, *i.e.*, to use the Mandate to quell Petitioners' free exercise of religion.

F. The Government Has Less Restrictive Means of Furthering Its Goals.

Under strict scrutiny, the government must also show that the Mandate "is the least restrictive means of furthering" its interests. *Thomas*, 450 U.S. at 718. This Court will not assume that "plausible, less restrictive alternative[s] would be ineffective." *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 824 (2000). If means less burdensome on religious freedom exist, the government "must use [them]." *Id.* at 813. It may not choose a regulatory "scheme that broadly stifles the exercise of fundamental personal liberties." *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) (quotation omitted).

There is no question in this case that the government could serve its ends through means far less restrictive of religious freedom than the Mandate. The government already subsidizes contraception on a massive scale. Nothing prevents

it from expanding access to federal programs, such as Medicaid, that serve the young, unmarried, undereducated, and low-income women who are most at risk for unintended pregnancies. *See* App. 42–43. It could also provide additional funding to state contraceptive programs that serve such groups. *See* Guttmacher Inst., *Facts on Publicly Funded Contraceptive Services in the U.S.* (May 2012), *available at* http://www.guttmacher.org/pubs/fb_contraceptive_serv.html (last visited Jan. 9, 2014).

Alternatively, the government could offer a tax credit to any women it believes suffer from the cost of buying their own contraception. It could devise a free or heavily-subsidized contraceptive-coverage plan to be made available on the government's healthcare exchanges or through multi-state plans. It could also give insurance or pharmaceutical companies incentives to offer contraceptives to vulnerable populations.

All of these options are "workable," *Grutter v. Bollinger*, 539 U.S. 306, 339 (2003), and much "less restrictive" of religious freedom, *Playboy*, 529 U.S. at 824. Unfortunately, the government has consistently refused to give them any "serious, good faith consideration." *Grutter*, 539 U.S. at 339.

Less restrictive alternatives undermine the government's case even if they cost more or are less directly effective. For example, *Riley* involved a state law that sought to curb fraud by requiring professional fundraisers to disclose how much of the proceeds they collected would come to them. 487 U.S. at 786. Even though this measure was the most

direct and effective means of combating fraud, it compelled the fundraisers to speak the government's desired message. *Id.* at 800. This Court struck down the law in light of less restrictive government alternatives, such as publishing detailed financial disclosure forms and vigorous enforcement of antifraud laws. *Id.* Both alternatives cost the government money and were less effective than forcing private citizens to implement the government's goals. But the government was required to use them anyway.

"Precision of regulation" through the use of means respectful of citizens' fundamental rights is required in areas "so closely touching our most precious freedoms," including the free exercise of religion. *Id.* at 801 (quotation omitted). In this case, no compelling reason justifies requiring Petitioners to provide abortifacient contraceptives to their employees. *Cf. Gilardi*, 733 F.3d at 1222. Contraceptives will have the same effects regardless of who provides them.

Incursions on religious employers' free exercise rights "must be a last—not first—resort." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002); *see also* Pet. App. 86a (noting the government "must seek out religiously neutral alternatives before choosing policies that impinge on religious liberty"). The government has consistently made little to no "effort to explain how the [Mandate] is the least restrictive means of furthering its stated goals." *Korte*, 735 F.3d at 687. Thus, the Mandate fails the strict scrutiny test.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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January 10, 2014